Supreme Court, U.S.
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83-1876

No. [redacted]

In The
Supreme Court of the United States
October Term, 1983

TURNER ADVERTISING COMPANY,

Petitioner,

vs.

FRANCES REES GARCIA, n/k/a
EMILY FRANCES REES, and
EMILY WALSH CARNES,

Respondents.

**ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a violation of the right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States to find a party in contempt of a court order but not impose a sanction

(i) when the party does not complain at trial or on appeal that it is a constitutional violation;

(ii) when the party alleges, but does not prove, that it is unable to comply with the court order;

(iii) when the party voluntarily created the alleged inability to comply with the court order; and,

(iv) when the party is in fact able to comply with the court order.

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No. 83-1826

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STATEMENT OF THE CASE

Respondents submit the following as the material facts.

On January 11th, 1983, the Trial Court entered an order permanently restraining and enjoining Petitioners,

owners of an outdoor advertising sign, and the owners of the property upon which the sign was erected, from continuing the presence of the sign on the property which was adjacent to property of the Respondents.

On January 17th, 1983, Respondents recorded a Warranty Deed and a purchase money Deed to Secure Debt by which they conveyed their adjoining property to an uninvolved third party and took the property back as security for the purchase price.

On May 11th, 1983, the Supreme Court of Georgia affirmed the grant of the permanent injunction, and on June 1st, 1983, denied a re-hearing.

On July 12th, 1983, Respondents filed a motion to find the Petitioner and the land owners in contempt because the sign had not been removed.

On July 19th, 1983, Petitioner filed a motion to vacate the injunction contending the Respondents did not have sufficient interest in the property to maintain the injunction.

On August 1st, 1983, Petitioner transferred the sign to Turner Outdoor Advertising, Ltd.

On August 10th, 1983, at the hearing on the motion for contempt and to vacate, the Petitioner informed the Court and the Respondents for the first time of the August 1st, 1983, transfer of the sign.

On August 26th, 1983, the Trial Court denied the motion to vacate of the Petitioner and found the Petitioner in contempt for failure to remove the sign.

On January 31st, 1984, the Supreme Court of Georgia affirmed the denial of the motion to vacate and the find-

ing of contempt by the Trial Court and on February 15th, 1984, denied a re-hearing.

In its Brief to the Supreme Court of Georgia, the Petitioner stated the issue it asserts here as follows:

> "Can a party which does not have the ability to comply with a court order be held in contempt of the Order? (Enumeration of Error 2)."

The Petitioner never raised or argued any constitutional grounds for this issue. The petition for a writ of certiorari was the first time a due process violation was raised.

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SUMMARY OF ARGUMENT

The petition for the writ of certiorari should be denied because

1. The Petitioner did not raise the constitutional issue of violation of due process in the Trial Court or in the Supreme Court of Georgia.

2. The Petitioner voluntarily created its alleged inability to comply with the court order.

3. The Petitioner failed to carry its burden of proving that it was unable to comply with the court order and that the finding of contempt was penal.

4. The Petitioner is able to comply with the court order.

———o———

ARGUMENT

1. The Petitioner did not raise the constitutional issue of violation of due process in the Trial Court or in the Supreme Court of Georgia.

The statement of the legal issue made by the Petitioner in its appeal to the Supreme Court of Georgia is set forth in the statement of the case and their entire legal argument to the Supreme Court of Georgia is set forth at App. 1. Petitioner never raised at trial the constitutional issues it asserts in this petition.

2. If the Petitioner is unable to comply with the order of the Trial Court, the inability was voluntarily created by the Petitioner.

> " . . . where an alleged contemnor has voluntarily and contumaciously brought on himself disability to obey an order or decree, he cannot avail himself of a plea of inability to obey as a defense to a charge of contempt." 17 Am Jur 2d, Contempt § 51, p.53, accord 17 CJS Contempt § 19, p.48-49.

In *McPhaul v. United States,* 364 US 372, 378[2]; 5 LEd 2d 136, 142; 81 SCt 138, reh den, 364 US 925, 5 LEd 2d 264, 81 SCt 282 (1960), this Court stated

> "A court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability . . ." Citing *Jurney v. MacCracken,* 294 U.S. 125, 79 LEd 802 (1935).

The *Jurney* case, *supra,* is the same case that *Fed. Trade Comm. v. Blane,* 308 F.Supp. 932, 933-934[4] [5] (N.D.Ga. 1970) is based upon, which is the case cited by the trial court and the Supreme Court of Georgia in finding the Petitioner in contempt.

If Petitioner can voluntarily induce inability to comply and escape contempt, then enforcement of an injunction becomes a game of hide and seek.

> "Suits would be interminable, if the right of parties could be disturbed by mesne conveyances, and a necessity imposed for the introduction of other parties upon the record." *Secombe v. Steele,* 61 US 94, 105; 15 LEd 833, 837 (1858).

3. The Petitioner had the burden of proving that it was unable to comply with the order of the Trial Court, and the Petitioner failed to carry this burden.

> "A person who seeks to satisfy the court that his failure to obey an order or decree was due entirely to his inability to render obedience, without fault on his part, must prove such inability. In other words, the burden of proving inability to comply with the order allegedly violated is on the alleged contemnor." 17 Am Jur 2d, Contempt § 51, p.54.

This Court also places the burden on the Petitioner to prove his inability to comply. *McPhaul, supra,* 364 US p.379[4], 5 LEd 2d p.142.

The only evidence submitted by the Petitioner that it was unable to comply with the order of the Trial Court was an affidavit that stated the conclusion that the Petitioner could not comply.

Further, the Petitioner contends that the finding of contempt was penal, but it is the burden of the Petitioner to show that it was penal. *In re Grand Jury Investigation, Appeal of Braun,* 600 F.2d 420[7] (1979); *Lambert v. State of Montana,* 545 F.2d 87, 90[4.5] (1976). The Petitioner made no showing that the finding of contempt was penal, and it is difficult to imagine how merely being

found in contempt without the imposition of any sanctions could be penal.

4. The Petitioner is able to comply with the order of this Court.

O.C.G.A. § 23-1-18 states

> " . . . a pending action shall be a general notice of an equity or claim to all the world from the time the action is filed and docketed. If the same is duly prosecuted and is not collusive, one who purchases pending the final outcome of the litigation shall be affected by the decree rendered therein."

The purchaser of the sign took subject to the decree in this case. The Petitioner must now remove this sign. This may involve a question of damages for breach of contract between the purchaser and the Petitioner, but that does not prevent Petitioner from removing the sign.

CONCLUSION

Respondent is entitled to have the Petition for the Writ of Certiorari denied.

Respectfully submitted, this the 13th day of June, 1984.

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APPENDIX

B. THE COURT ERRED IN FINDING TURNER IN CONTEMPT

The uncontradicted evidence was that Turner no longer owned the outdoor advertising sign involved in this action when Appellees' motion for contempt was heard. Nevertheless, the trial court found Turner in contempt of its January 11, 1983 order (R3d-67). This ruling was erroneous and contrary to the law of this State.

"It is essential to constitute a contempt that the thing ordered to be done be within the power of the person against whom the order is directed." *In re Brookins,* 153 Ga. App. 82 (1980). The inability to comply with a court's order is a complete defense to a motion for contempt. *Littlefield v. Town of Adell,* 151 Ga. 684, 694 (1920); *In re Brookins, supra.* at 87.

In the case at bar, the uncontradicted evidence was that Turner no longer owned the sign which was the subject matter of the injunction. Turner was without authority or control to remove or alter the sign in any way. Therefore, Turner was unable to comply with the court's January 11, 1983 order. Despite these facts, the trial court found Turner in contempt. As it was not within Turner's power to comply with the court's order and it was totally unable to do so, the trial court erred in holding Turner in contempt of its January 11, 1983 order.